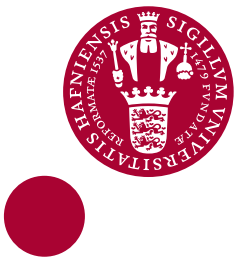

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COMMITMENTS IN PHASE ONE MERGER PROCEEDINGS: THE COMMISSION'S POWER TO ACCEPT AND ENFORCE PHASE ONE COMMITMENTS

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1. Introduction

On 21 September 1990, the EC Merger Regulation[1] entered into force. Since then, concentrations[2] with a Community dimension must be notified to the European Commission before they are put into effect. The Regulation complements Articles 85 and 86 of the Treaty. However, where the latter provisions must follow the laborious procedures laid down in Regulation 17,[3] a different set applies under the Merger Regulation, making it considerably quicker to obtain a final and binding decision under this Regulation than under Articles 85 and 86.[4]

* Faculty of Law, University of Copenhagen. The author is very grateful to Adj. Professor, former President of the European Court of Justice, Ole Due of the University of Copenhagen, Dr. Hartmut Krause LL.M. of the lawfirm Hengeler Mueller Weitzel Wirtz, Frankfurt, and Mr Niels Fenger of the Danish Ministry of Justice for having provided very insightful comments on a draft of this article. Obviously, the author alone shall be held responsible for the views and fallacies which appear in the final article.

1. Council Regulation (EEC) No. 4064/89 of 21 Dec. 1989 on the control of concentrations between undertakings, O.J. 1989, L 395, Corrigendum in O.J. 1990, L 257.

2. The Merger Regulation applies the term "concentration" which is broader than the term "merger".

3. Council Regulation No. 17 of 6 Feb. 1962. First Regulation implementing Arts. 85 and 86 EC amended by Regulation No. 59, by Regulation No. 118/63/EEC and by Regulation (EEC) No. 2822/71.

4. Structural joint ventures and arrangements benefitting from the opposition procedure provided in certain block-exemptions may however obtain a quick clearance

Under the Merger Regulation, the Commission's examination of a concentration case is divided into two phases. The first phase lasts up to one month and is only of a preliminary kind. During this phase the Commission only ascertains whether the operation comes within the scope of the Regulation and whether it "raises serious doubts as to its compatibility with the common market".[5] If this is so, the Commission initiates an in-depth second phase examination, which may last up to four months, during which it examines whether the concentration "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it".[6]

The Commission has the powers straightforwardly to clear or prohibit a concentration. Moreover, Article 8(2)(2) of the Regulation also vests in the Commission the powers to:

> "attach to its decision conditions and obligations intended to ensure that the undertakings comply with the commitments they have entered into *vis-à-vis* the Commission with a view to modifying the original concentration plan."

This power to attach conditions and obligations to the clearance, however, only concerns decisions issued after a second phase investigation. Even though the Regulation does not, explicitly, provide the Commission with the powers to attach conditions and obligations to a clearance decision issued already after a first phase examination, the Commission

under Art. 85. See the Commission's internal guidance note for the handling of structural joint ventures, published in (1993) CMLR, 238-240 and e.g. Commission Regulation (EEC) No. 418/85 of 19 Dec. 1984 on the application of Art. 85(3) EC to categories of research and development agreements and amended by Commission Regulation (EEC) No. 151/93 of 23 Dec. 1992.

5. Art. 6(1)(c) of the Regulation. More than 90% of all merger cases end with a first phase decision.

6. Art. 2(3). It is thus clear that the net is cast more widely under the phase one test compared to the test in phase two.

has in fact accepted modifications at this stage.[7,8] The obvious question is whether the Commission's clearance of concentrations on the basis of commitments, following only a first phase examination, is lawful?[9]

In this paper I will examine the pros and cons of phase one commitments. However, before embarking on this analysis, a brief note is needed on the terms "commitment", "condition" and "obligation". The parties to a concentration may offer *commitments* to the Commission

7. See the following first phase clearances: *Fiat Geotech/Ford New Holland* (Case IV/M009), Decision of 8 Feb. 1991; *TNT/Canada Post, DPB Postdienst, La Poste, PTT Post, Sweden Post* (Case IV/M102), Decision of 2 Dec. 1991; *Courtaulds/SNIA*, (Case IV/M113), Decision of 19 Dec. 1991; *Grand Metropolitan/Cinzano* (Case IV/M184), Decision of 7 Feb. 1992; *IFINT/EXOR* (Case IV/M187), Decision of 2 March 1992; *Thomas Cook/LTU/West LB* (Case IV/M229), Decision of 14 July 1992 (on this case, see Clough, *EC Merger Regulation – A practical guide to the EC merger and acquisition rules*, Financial Times Management Report (London, 1994), p. 189 and Lowe, *Remedies in EC Merger Cases*, speech given to the EC Committee of the American Chamber of Commerce in Belgium, Hotel Europa, Brussels, 14 June 1993 at p. 7); *Elf Aquitaine-Thyssen/Minol* (Case IV/M235), Decision of 4 Sept. 1992; *Air France/SABENA* (Case IV/M157), Decision of 5 Oct. 1992; *British Airways/TAT* (Case IV/259), Decision of 27 Nov. 1992; *BHF/CCF/Charterhouse* (Case IV/M319), Decision of 30 Aug. 1993; *Unilever France/Ortiz Miko (II)* (Case IV/M422), Decision of 15 March 1994; *Elf Atochem/Rütgers* (Case IV/M442), Decision of 29 July 1994; *Glaxo/Wellcome* (Case IV/M555), Decision of 28 Feb. 1995; *Swissair/Sabena* (Case IV/M616) Decision of 20 July 1995; *Allianz/Elvia/Lloyd Adriatico* (Case IV/M539), Decision of 3 Apr. 1995 (on this case, see also Commission, *XXVth Report on Competition Policy 1995*, Luxembourg 1996 at part 2,III,A,1.10), *Repola/Kymene* (Case IV/M646) Decision of 30 Oct. 1995 and *Bank Austria/Creditanstalt* (Case IV/M873), Decision of 11 March 1997.

8. Heidenhain, "Commitments in EC merger control", in Hawk (Ed.), *1993 Fordham Corp. L. Inst.*, p. 435 at p. 441 points out that first phase commitments "are not fundamentally different in their content from those given in the Second Phase Proceedings."

9. These questions are not of a purely academic interest as is clear from the case *De vennootschap naar Frans recht TAT EUROPEAN AIRLINES v. De N.V. Sabena*, decision by Hof Van Beroep te Brussel, Nr.: 1996/AR/1275, Judgment of 8 Jan. 1997.; unpublished. At the time of writing it had not been decided whether the case shall be appealed to the Supreme Court. See also Overbury and Drauz, *EC Merger Control – Annual Review* (Frank Fine, ed.), Legal Studies Publishing Ltd., London 1993 at pp. 115-116 and p. 116 respectively, discussing the Commission decision *Air France/Sabena*, *supra* note 7, the decision giving rise to the Belgian case.

during the examination in order to have the transaction cleared. The Commission may thereupon decide to make such a commitment either a *condition*, which must be fulfilled in order for the clearance to become valid, or an *obligation* the fulfilment of which does not in itself affect the validity of the clearance decision.[10] The Commission may also decide not to attach a condition or an obligation to the commitment, for instance because the Commission considers it too difficult to control the compliance therewith.[11]

2. Discussion

2.1. *Interpretation by analogy*

The immediate argument in favour of first phase commitments is an interpretation by analogy so that the Commission's power to accept second phase commitments is also applied in phase one.

By giving the Commission express powers to clear a concentration on the basis of commitments (in phase two), the drafters of the legislation have shown that they favour a flexible approach. Consequently, it would

10. Berlin, *Contrôle communautaire des concentrations* (Pedone, 1992) at pp. 307-310 and 314-315. See also Heidenhain, *supra* note 8 at pp. 437-439 and Kerse, *E.C. Antitrust Procedure*, 3rd ed. (Sweet & Maxwell, 1994) at pp. 217-220. In practice it seems that the terms condition and obligation are used interchangeably; see for instance *XXIInd Report on Competition Policy 1992* at para. 9 in which it is stated that "[t]he *conditions* which the Commission imposed consisted mainly of *obligations*. . . " (italics added).

11. In *MSG/Media Service* (Case IV/M469), Decision of 9 Nov. 1994, O.J. 1994, L 364/1 the Commission at para 95 rejects the parties' commitments *inter alia* on the basis that their enforceability may be put into question. See also *Siemens/Italtel* (Case IV/M468), Decision of 17 Feb. 1995, O.J. 1995, L 161/27, at para 62 and *Mercedes-Benz/Kässbohrer* (Case IV/M477), Decision of 14 Feb. 1995, O.J. 1995, L 211/1, at paras. 78 and 90; *Nordic Satelite Distribution* (Case IV/M490), Decision of 19 July 1995, O.J. 1996, L 53/20 at paras. 156-158 and 159 and *XXVth Report on Competition Policy 1995* at para 135. As pointed out by Fuchs, "Zusagen, Auflagen und Bedingungen in der europäischen Fusionskontrolle", (1996) WuW, 269 at 278-279, the Commission can only take a commitment into consideration where it has attached conditions or obligations thereto, thereby making it possible to enforce the commitment.

be rather strange if the Commission should apply a rigid approach in the first phase, but a flexible one in the second phase. It is therefore argued that a flexible approach, along the lines provided by the drafters in the second phase, necessarily means that the Commission must accept commitments in phase one, by interpreting Article 8(2) by analogy.

Whilst this line of reasoning may appear persuasive, it is difficult to find any more substantive support for it. As concerns the structure provided by the Regulation, the legislators have not provided the necessary time, the relevant legal safeguards, or the necessary enforcement powers in phase one, thereby more than indicating that it was not their intention to allow phase one commitments. Regarding the wording of the Regulation, it is explicitly provided that the Commission may attach conditions or obligations to second phase commitments[12] and the Commission is also explicitly given the necessary powers to enforce these. Thus, the legislators have shown that when drafting the Regulation they were conscious of vesting in the Commission the ability to accept commitments.

It is clear that the arguments in favour of applying Article 8(2) by analogy are strong, but it is equally clear that such interpretation does not find any real support in the Regulation; in our opinion it must therefore be dismissed.

2.2. *Proportionality*

A phase one examination may last up to one month, whereas a phase two examination may last an additional four months. If, during the first phase proceedings, the undertakings concerned offer suitable commitments to remedy any competition concerns which the Commission may have, it appears to be unduly disruptive and to entail unnecessary administrative effort and delay for these undertakings (as well as for the Commission) if the Commission is forced to open a four months

12. Indeed, Art. 7(4) vests in the Commission the power to derogate from the requirement that the concentration must be suspended at least 3 weeks from the day of notification. This derogation may be made subject to conditions and obligations so on this specific point the Regulation allows the use of conditions and obligations in phase one.

second phase examination with the only objective of formally accepting some commitments which it was prepared to accept already during phase one, had it had the powers to do so.[13]

In other words, where a concentration creates or strengthens a dominant position whereby effective competition is significantly impeded in the common market, it will be disproportionate to open a time-consuming second phase examination if the commitments offered by the undertakings concerned could remedy the problem already during the first phase. Accordingly, the question is not whether the Commission possesses the power to accept commitments in phase one, but rather whether the Commission is obliged to accept commitments in phase one on the basis of the principle of proportionality.[14] One may go a step further and argue that if the undertakings concerned offer first phase commitments which, if fulfilled, will mean that the concentration does not raise "serious doubts as to its compatibility with the common market",[15] then the Regulation does not vest in the Commission the power to enter a second phase examination, so it has no other choice but to issue a first phase clearance.[16]

The proportionality argument hinges on whether the extra time, necessary if the Commission enters a second phase examination solely to accept some commitments, is disproportionate. Put differently, is

13. Drauz, "Remedies under the Merger Regulation", paper given at the Fordham Corporate Law Institute, Twenty-Third Annual Conference 1996 (not yet published) at point III.B (p. 12). See also *XXIVth Report on Competition Policy 1994*, at para 315.; Drauz and Schroeder, *Praxis der europäischen Fusionskontrolle*, 3rd ed. (Verlag Kommunikationsforum GmbH, 1995), at p. 204; Zachmann, *Le contrôle communautaire des concentrations* (LGDJ, 1994), at p. 366 and Ehlermann, "Deux ans d'application du contrôle des concentrations: bilan et perspectives", (1993) RMC, 242 at 247-248.

14. *Quaere*, is the proportionality consideration only relevant *vis-à-vis* the undertakings concerned, or is it also relevant *vis-à-vis* third parties and Member States so that the Commission may not accelerate the decision process to such degree that the latter's rights are disproportionately affected? In this author's view this aspect of the proportionality argument is equally important.

15. Art. 6(1)(c).

16. Bergmann, "Settlements in EC merger control proceedings: A summary of EC enforcement practice and a comparison with the United States", 62 *Antitrust Law Journal*, 47 at 86.

a second phase examination, merely in order to attach conditions or obligations to some commitments, put forward by the undertakings concerned, to have the Commission clear the concentration, disproportionate to what is required.

On the one hand, it must first be acknowledged that speed is often of the essence in merger cases so that the difference between only having to go through a phase one examination (one month) rather than having to submit to a full investigation (together with the first phase lasting up to five months) may be very considerable. On the other hand, before accepting the proportionality argument, one must first ascertain that entering a second phase solely to attach conditions or obligations to some commitments, necessarily results in a disproportionate prolongation of the examination. The legislators have imposed certain time limits on the Commission. It must end the first phase investigation as soon as it has established either that the operation falls outside the scope of the Regulation or that it falls within the scope and does/does not raise serious doubts as to its compatibility with the common market. This decision must be reached at the latest one month from receipt of the notification. The second phase must be ended "*as soon as it appears* that [the inacceptable parts of the concentration] have been removed, particularly as a result of modifications made by the undertakings concerned"[17] and at the latest within four months of the initiation of the second phase procedure.[18]

If a competition problem is so easily identifiable that it is possible adequately to address it during the first phase, it is reasonable to assume that the Commission identifies the problem early in the preliminary examination. In contrast, if this problem is only identified in the late stages of the first phase, it will be very difficult for the Commission to give the possible remedies of a competition problem the thorough consideration necessary.

Where the Commission finds that a notified operation falls within the scope of the Regulation and "raises serious doubts as to its compatibil-

17. Art. 10(2), (emphasis added).
18. Art. 10(3).

ity with the common market"[19] a second phase examination must be initiated. If the Commission is able to identify the competition problems within e.g. one week of the date of notification,[20] it must end the first phase examination even though the one month deadline has not yet expired. Upon entering the second phase examination the Commission must duly observe the different legal safeguards laid down in the Regulation.[21] Nevertheless, if the problems are easily identifiable and if the parties to the concentration swiftly offer adequate commitments to remedy these, the second phase examination can be finished within a time frame which is not substantially longer than what had been the situation if the Commission had ended the case on the basis of commitments given during the first phase.[22]

The present system thus does provide the necessary flexibility for making swift second phase clearances on the basis of commitments, thereby eliminating the basis for the proportionality argument.

2.3. *Legal safeguards*

The Regulation clearly distinguishes between a preliminary first phase and an in-depth second phase examination. During the preliminary phase one, the Commission only examines two matters. First, whether

19. Art. 6(1)(c).

20. Under Art. 9(2) a Member State may within three weeks of the date of receipt of a copy of a notification request that the Commission refers the case to its national competition authority. The Commission may therefore not issue a first phase clearance before the three week period has expired. It appears, however, that the Commission may enter a second phase procedure without awaiting the expiration of this period, cf. Art. 9(4)(b).

21. Of course, Member State representatives may want to use the legal safeguards applicable in second phase proceedings thereby delaying the process somewhat. See on this point Hawk and Huser, *European Community Merger Control: A Practitioner's Guide* (Kluwer Law International, 1996) at pp. 309 and 326.

22. Moreover, as shown *infra* at 2.3. with note 35, the Commission has submitted a proposal to the Council according to which first phase examinations, which also cover commitments, may last up to 6 weeks. If this proposal is successful, the time difference between a first phase decision covering commitments and a second phase decision, as the one described here, may vanish.

the operation falls within the scope of the Regulation, and second whether the operation gives rise to serious doubts as to its compatibility with the common market. If the answers to these two questions are affirmative, the Commission must open an in-depth examination.

Allocating the substantive appraisal to phase two and making phase one of a purely preliminary kind means that the large majority of legal safeguards have only been included in phase two. Hence, a decision following a second phase examination must be taken by the full college of Commissioners whereas a first phase decision may be taken by the Commissioner for competition together with the President of the Commission.[23] The legislators thus intended the less straightforward cases to be decided by the full college of Commissioners, and thereby instituted a system of checks and balances.[24]

A number of other legal safeguards exist. Regarding both first phase and second phase proceedings, the Commission is required to carry out its investigations in "close and constant liason" with the national competition authorities.[25] However, only during second phase examinations is it mandatory to hear the special Advisory Committee, made up of representatives of the Member States, before reaching a final decision.[26]

23. Cook and Kerse, *E.C. Merger Control* (Sweet & Maxwell, 1996), p. 191 with footnote 12 assume that in *Air France/Sabena*, *supra* note 7 the French and Belgian companies relied "on the collective good sense of the French President of the Commission and the Belgian Competition Commissioner."

24. Brown, "Judicial review of Commission decisions under the Merger Regulation: The first cases", (1994) ECLR, 296-305 at 305 writes that "the most important check in practice on the quality of the MTF's [the Merger Task Force of the Commission] analysis in most cases is the threat that the 17 Commissioners will not endorse the MTF's draft decision." At the same time, however, he also notes that the Commissioners cannot be immune from political considerations. In the case *Mannesmann/Vallourec/Ilva* (Case IV/M315), Decision of 31 Jan. 1994, O.J. 1994, L 102, p. 15, the college of Commissioners overturned the proposal for a decision submitted by the Commission services. See also Cook and Kerse, op. cit. *supra* note 23 at p. 196.

25. Recital 20 and Art. 19(2) of the Regulation.

26. See Art. 19(3)-(7). In *Mercedes Benz/Kässbohrer*, *supra* note 11, the MTF apparently proposed a clearance decision that was voted down by the Advisory Committee causing the Commission to redraft the decision, cf. Hawk and Huser, op. cit. *supra* note 21 at p. 315.

The Regulation likewise only requires the publication of second phase decisions in the Official Journal of the European Communities.[27] The Commission and the national competition authorities may also hear third parties during the investigation where these have shown a sufficient interest in the case.[28] The Regulation only provides the latter safeguard regarding second phase examinations.[29]

The undertakings concerned only make phase one commitments where they believe that the Commission will otherwise find that the concentration gives rise to serious doubts as to compatibility with the common market. Under the system set up by the legislators, the "serious doubts" cases were intended to be examined in phase two, meaning that all the safeguards provided in this phase would also apply to the commitments offered by the undertakings concerned. Accepting commitments in phase one necessarily means that the phase two safeguards do not apply.[30] The Commission is aware of this problem and has attempted to remedy it by allowing third parties and Member States

27. Art. 20(1). The Commission, at its own initiative, has decided to make all first phase decisions accessible to the public.

28. Art. 18(4).

29. This is clear from reading Art. 18(1) and (4) in conjunction, see likewise, Cook and Kerse, op. cit. *supra* note 23 at p. 114. Nevertheless, apparently the CFI in Case T-3/93, *Air France* v. *Commission* (DAN AIR), [1994] ECR II-121, at para 81 did not distinguish between the first and the second phase regarding the application of Art. 18(4): cf. Toth in his case note in 32 CML Rev., 271 at 286. It is nonetheless established practice for the Commission to offer Member State authorities and third parties the opportunity of commenting on commitments proposed in the first phase, cf. Commission, *Community Merger Control – Green Paper on the Review of the Merger Regulation*, COM(96) 19 fin., Brussels 31.1.1996, at para 123. See also Drauz, op. cit. *supra* note 13 at point III.B (pp. 12-13) and *XXIVth Report on Competition Policy 1994* at para 315.

30. Indeed the Commission has been under heavy criticism for using commitments in phase two as a means of industrial engineering, making a cautious approach to phase one commitments all the more important. See further Portwood, *Mergers under EEC Competition Law* (The Athlone Pres, 1994) at pp. 138-139 and 148-149; Livingston, *Competition Law and Practice* (FT Law & Tax, 1995) at p. 1013; Clough, op. cit. *supra* note 7 at p. 189; Immenga, *Die Europäische Fusionskontrolle im wettbewerbspolitischen Kräftefeld* (Mohr, 1993) at pp. 29-31 and Davies and Lavoie, "EEC merger control – A half term report before the 1993 review?", 16 *World Competition*, no. 3, 27 at 31-33. Contrast with Overbury, "Politics or policy?

to comment on commitments proposed in phase one proceedings. This fine initiative has, unfortunately, run up against the problem that often phase one does not allow the necessary time for such a hearing to make sense.[31] For instance in *Repola/Kymmene*[32] the Commission provided the Member States with only 24 hours to comment on the proposed commitments, causing the British, Danish, French and German competition authorities to state that under these circumstances they were not able to put forward a final opinion.[33]

There can hardly be any doubt that the safeguards introduced by the Commission in phase one are insufficient compared with those available in phase two.[34] This has, indirectly, been acknowledged by the Commission, since in its 1996 proposal for a revision of the Regulation it notes that

> "[i]t has been considered appropriate to clarify the situation with regard to first phase commitments . . . . [The proposal] extends the first phase to six weeks in cases where commitments are offered

The demystification of EC merger control", *1992 Fordham Corp. L. Inst.*, p. 557, at pp. 583-585 and 587 and Lowe, op. cit. *supra* note 7 at pp. 6 and 11-12.

31. Within the span of only one month the Commission must first examine the case, then receive the parties' commitments whereupon third parties (which must first be identified) and Member States must be heard. Finally the Commission must evaluate the commitments in the light of the comments obtained through the hearing before making a decision. According to Drauz and Schroeder, op. cit. *supra* note 13 at p. 214, consultation with Member States and hearing third parties is only possible where the commitments are put forward within two weeks from the date of notification.

32. *Supra* note 7.

33. Cf. Stockmann and Schultz, *Kartellrechtspraxis und Kartellrechtsprechung 1995/96* (RWS Verlag Kommunikationsforum GmbH, 1996), at p. 290. See also Löffler in Langen/Bunte, *Kommentar zum deutschen und europäischen Kartellrecht*, 7th ed. (Luchterhand, 1994) at p. 2050; Heidenhain, op. cit. *supra* note 8 at p. 441 and *XXIIIrd Report on Competition Policy 1993* at para 73(i).

34. Apparently both third parties and Member States have expressed concerns about the transparency regarding the Commission's use of first phase commitments, cf. Livingston, op. cit. *supra* note 30 at pp. 790 and 1009 and Hawk and Huser, op. cit. *supra* note 21 at p. 324. See also Green, "The appraisal of an appraisal: The compatibility of concentrations under Regulation 4064 89/EC", in Fine (Ed.), *EC Merger Control – Annual Review* (Legal Studies Publishing Ltd., 1993) at p. 80.

> by the parties, *in order to allow effective consultation of Member States and third parties . . . .*"[35]

Moreover, according to the Commission's proposal for a revision it will only be possible to put forward first phase commitments during the first three weeks (of what will be six weeks after the proposed extension) of the first phase in order to make it possible to hear the Member States.[36]

One might also argue that requiring the Commission to enter a phase two procedure is unfounded if the undertakings concerned may easily avoid entering such procedure without materially changing the operation (including the proposed commitments) and still obtain a clearance. This possibility is open if the undertakings concerned withdraw their notification only to make a new notification with the necessary commitments worked into the concentration plan.[37] If the adapted concentration plan does not give rise to serious doubts as to the compatibility with the common market, the Commission will clear the operation on the basis of the first phase examination. On the face of it there is no material difference between the situation where the concentration

35. Cf. para 31 of the *Communication from the Commission to the Council and to the European Parliament regarding the revision of the Merger Regulation*, COM(96) 313 fin. of 12 Sept. 1996, (emphasis added). Fuchs, op. cit. *supra* note 11 at 283 with note 70, does not find this extension convincing.

36. Cf. *Communication from the Commission to the Council and to the European Parliament regarding the revision of the Merger Regulation*, *supra* note 35 at para 31 with footnote 3. It is also worth of note that the Commission has found it necessary to require second phase commitments to be submitted at the latest one month before the day of expiry of the second phase, cf. Art. 18 of Commission Regulation (EC) No. 3384/94 of 21 Dec. 1994 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings. For the background to this alteration, see Drauz, op. cit. *supra* note 13 at point III.A (p. 12); Hawk and Huser, op. cit. *supra* note 21 at p. 326 and *XXIVth Report on Competition Policy 1994* at para 236.

37. Lowe, op. cit. *supra* note 7 at p. 8. See for an example, Broberg, "EC merger control", (1996) *European Management Journal*, 622 at 626 and Drauz, op. cit. *supra* note 13 at point III.B (p. 13). See also Drauz and Schroeder, op. cit. *supra* note 13, p. 214; the Commission's *Green Paper*, *supra* note 29 at para 126 and, critical, Mülbert, "Zusagen im deutschen und europäischen Fusionskontrollrecht", (1995) *Zeitschrift für Wirtschaftsrecht*, 699 at 711.

is cleared after the undertakings have offered commitments and the situation where these commitments have been worked into the concentration plan.[38] However, if the parties to the concentration fail to duly observe the notified (and cleared) concentration plan, the Commission may claim that the concentration actually carried out differs so much from the cleared one that the Commission does not consider these to be identical. Consequently the validity of any transaction putting the actual concentration into effect is dependent on the Commission's clearance.[39] It follows that a commitment which has been worked into a renotified concentration plan does not present the same enforcement problems as do commitments which are not part of the concentration plan.[40]

Moreover, the argument that clearing a renotified concentration in which the commitments have been worked into the concentration plan is no different from clearing the concentration after having accepted first phase commitments simply overlooks the fact that the problem for introducing legal safeguards in phase one is the lack of time. Encouraging the undertakings concerned to renotify an amended operation allows Member States, third parties and the Commission itself more time to evaluate the changes. Also, experience has shown that the Commission might open a phase two proceeding even where the undertakings concerned have renotified an operation with the "commitments" implemented into the concentration plan. This is a clear indication that the extra time available in the case of a renotification makes a more careful examination possible.[41] Moreover, as noted above, working the com-

38. Apparently the Commission now favours renotification over accepting commitments in the first phase, cf. Hawk and Huser, op. cit. *supra* note 21 at pp. 323-324 and Livingston, op. cit. *supra* note 30 at pp. 916 and 1009, the latter apparently taking the view that "[t]he Commission now insists on the withdrawal of the original notification and submission of a new notification containing modified proposals on which public consultation can take place". The view that the Commission "insists" on this does not seem to find support in the Commission's decisions.

39. Art. 7(5).

40. See also 2.5 *infra* concerning the distinction between amendments and commitments.

41. *Procter & Gamble/VP Schickedanz* (Case IV/M430), Decision of 21 June 1994, O.J. 1994, L 354/32.

mitments into the notified concentration plan does away with doubts as to their enforceability.

The lack of safeguards in phase one strongly supports the view that the Commission may not clear a concentration on the basis of commitments already at this stage.

2.4. *Enforcement*

2.4.1. *No enforcement power?*

The Regulation vests in the Commission the possibility of issuing fines[42] and of revoking a clearance decision[43] where the undertakings concerned do not duly observe an obligation attached to the decision. These powers only concern second phase decisions, however,[44] and the question is whether powers of the Commission to accept commitments in phase one *ipso facto* means that it also possesses the necessary powers to enforce such commitments. Indeed this question seems to have split even the Commission's Merger Task Force.[45]

The Merger Regulation is intended to be part of a system ensuring that competition in the common market is not distorted.[46] If a concentration is likely to cause lasting damage to competition in the common market, the undertakings concerned may offer commitments to counter this damage, making it possible for the Commission to clear the concentration. However, if the Commission is unable to enforce phase one

42. Arts. 14(2)(a) and 15(2)(a).

43. Art. 8(5).

44. For the same view, see Stockmann and Schultz, op. cit. *supra* note 33 at pp. 289-290. See also Hawk and Huser, op. cit. *supra* note 21 at p. 331; Löffler, op. cit. *supra* note 33 at p. 2050; Livingston, op. cit. *supra* note 30 at p. 1010; Cook and Kerse, op. cit. *supra* note 23 at p. 185; Bergmann, op. cit. *supra* note 16 at 86; Heidenhain, op. cit. *supra* note 8 at p. 440; Bos et al., *Concentration Control in the European Economic Community* (Graham & Trotman, 1992) at p. 262; Van Bael and Bellis, *Competition Law of the European Community*, 3rd ed. (CCH Europe, 1994) at p. 507 and Markert, case note to Elf Aquitaine-Thyssen/Minol, *EEC Merger Control Reporter* (Kluwer Law International) looseleaf, p. 872.1 at p. 872.4.

45. See Overbury and Drauz, op. cit. *supra* note 9 at pp. 114-117; Overbury, op. cit. *supra* note 30 at p. 577 and Drauz, op. cit. *supra* note 13 at point III.B (p. 13).

46. Art. 3(g) EC.

commitments, the undertakings concerned may be tempted to disregard these, which in turn may cause lasting damage to competition. Accepting commitments in phase one without being able to enforce these will therefore run counter to the aims of the Regulation and of the Treaty.

This problem may, however, be countered in three different ways. These three possibilities are examined below.

2.4.2. *Applying Article 8(2)(2) by analogy*

The most obvious way of enforcing a phase one commitment is through the analogous application of the powers provided in the Regulation regarding the enforcement of phase two commitments.[47] This solution has, however, been held to be "arguably inadmissible because it would be to the detriment of the parties to the proceeding."[48] It is true that the Commission's enforcement of a commitment given by the parties is to the detriment of the latter, and it is also true that in such circumstances an interpretation by analogy normally presupposes particularly persuasive arguments. Nevertheless, it must be acknowledged that the powers laid down in the Regulation to enforce conditions and obligations attached to second phase commitments are really incidental to the power to attach conditions and obligations to these commitments. In other words, it is arguable that the Commission's power to attach conditions and obligations to second phase commitments and its powers to enforce these must be seen as being part and parcel. Consequently, if it were accepted that the power to attach conditions and obligations to second phase commitments may be applied by analogy to first phase commitments, it would only be logical if the incidental powers to enforce these were to apply by analogy as well.

As is clear, the argument is absolutely dependent upon whether the Commission may attach conditions and obligations to phase one commitments by analogy to the Regulation's explicit powers to do so in phase two. In 2.2 above, this possibility was rejected: it follows that applying Article 8(2)(2) by analogy must be rejected as well.

47. See e.g. Fuchs, op. cit. *supra* note 11 at 285.
48. Bergmann, op. cit. *supra* note 16 at 86.

2.4.3. *The doctrine of implied powers*

The doctrine of implied powers presents the second possibility of vesting in the Commission the powers to enforce first phase commitments.[49] If we accept that the Commission possesses the power to accept first phase commitments, but that the phase two enforcement powers do not apply by analogy, then the Commission lacks the necessary power to enforce first phase commitments. It is equally obvious that if the undertakings concerned fail to comply with a commitment which brought the Commission to issue a phase one clearance, this does not contribute to the securing of undistorted competition in the common market; the central objective behind the Regulation.[50] This seems to be an obvious case for the doctrine of implied powers, empowering the Commission to enforce the commitment, for instance by revoking the clearance decision.

The weak point in this argument is that it presupposes that the Commission has the power to accept phase one commitments, which, it was argued above, is not the case.

2.4.4. *The contract construction*

The Commission's power to clear a concentration on the basis of commitments given in the second phase is clearly of a regulatory nature. The drafters of the Merger Regulation have provided a flexible system where the Commission may clear the concentration on the basis of modifications made subsequently to the notification. In order to assure that these modifications will be put into effect, the Regulation vests in the Commission the power to enforce these.[51] Perhaps as a reflection of this regulatory nature, the Commission may not impose changes on the concentration in return for a clearance. Instead the Commission is restricted to pointing out the problematic points in the concentration

49. See Bourgeois, "Undertakings in E.C. competition law", in Slot and McDonnell (Eds.), *Procedure and Enforcement in E.C. and U.S. Competition Law – Proceedings of the Leiden Europa Instituut Seminar on User-friendly Competition Law* (Sweet & Maxwell, 1993) at pp. 97-98 and Krause, "Article 6(1)b EC Merger Regulation: Improving the reliability of commitments", (1994) ECLR, 209 at 211.

50. See preamble 1 of the Regulation, referring to Art. 3(f) (now Art. 3(g)) EC.

51. Art. 8(2).

and thereupon it is solely for the parties to decide whether (and if so which) modifications shall be made before the Commission reaches its final decision.[52]

Regarding commitments made in the first phase, the situation may be different. Whether commitments made in the first phase are contractual or regulatory in nature depends on the Commission's legal basis for accepting such commitments. Where the Commission applies either Article 8(2) of the Regulation by analogy or refers to some implied powers (on the basis that opening a second phase proceeding would be disproportionate) the first phase commitment will be regulatory in nature. However, it might also be possible to apply a contract construction, borrowed from German law, to first phase commitments. In this case the commitment will be contractual in nature. Under the contract construction "undertakings not foreseen in the law itself, are viewed as a type of contract between the company which volunteers the undertaking and the public body".[53] In an article from 1994, Hartmut Krause has developed this construction.[54] The idea is that the undertakings concerned enter into commitments, and in return the Commission promises a first phase clearance. In order to be able to enforce this contract, an arbitration clause, giving the European Court of Justice jurisdiction in accordance with Article 181 EC, should be included. Krause explains that Article 181 contains the roots for the suggested approach and that

> "it is presupposed that the Community's arsenal of legal instruments contains contracts of subordination by means of which the Commission may exercise its sovereign power instead of issuing a unilateral administrative act."[55]

52. Cf. Van Bael and Bellis, op. cit. *supra* note 44 at p. 507 and Drauz, op. cit. *supra* note 13 at II.B (p. 3).

53. Cf. Drauz, op. cit. *supra* note 9 at p. 117. See also Bergmann, op. cit. *supra* note 16 at 87; Livingston, op. cit. *supra* note 30 at p. 1010 and, more elaborate, Krause, op. cit. *supra* note 49. According to Drauz and Schroeder, op. cit. *supra* note 13 at p. 206 the Commission has considered the idea, but it is not mentioned in the Commission's *Green Paper*, *supra* note 29 at paras. 122-126, so presumably it is no longer given serious consideration.

54. *Supra* note 49.

55. *Supra* note 49 at 216.

In essence, the enforcement of first phase commitments is then based on Article 181.

This contractual construction differs from the regulatory ones explained earlier, both with regard to the necessary procedural powers and with regard to the necessary substantive powers.

Hence, as concerns procedure, it is clear that the ordinary powers of the Court of Justice do not suffice for this purpose. It is therefore necessary (and also possible) to use Article 181 to vest in the Court of Justice jurisdiction to hear a case on the matter.

The substantive powers present significantly larger problems than do the procedural. Under the contract construction, there seems to be nothing restraining the Commission from requiring the parties to make certain specified commitments in return for the clearance. These phase one commitments will be directly enforceable before the Court of Justice. However, the scheme set up by the Merger Regulation does not even allow the Commission to require the parties to make certain commitments in return for a clearance in the second phase. The contract construction therefore vests in the Commission powers to be applied in the first phase, which are much more far-reaching than the powers which the Regulation itself vests in the Commission to be applied in the second phase. There can be no doubt that this is inconsistent with the scheme provided by the Merger Regulation.

Moreover, whereas it is possible to find the procedural powers to support the contract construction, it is more than difficult to find the necessary substantive powers. The Regulation itself clearly does not provide these powers. However, it is equally clear that Article 181 was not introduced in order to provide the Commission with certain administrative powers in situations where these powers cannot be found in the relevant legislation. Article 181 is not a substantive provision, but simply a provision on jurisdiction. While the Commission may rely on the freedom of contract regarding private contracts, a more substantive power is required before the Commission may enter into a public contract. No such power appears to exist. Consequently, the contract construction based on Article 181 EC is not, it is submitted, apt as the legal basis for accepting and enforcing first phase commitments.

Even though the contract construction creates its own justification for the Commission accepting phase one commitments (whereas the possibilities examined above at 2.4.2 and 2.4.3. presuppose a separate justification on this point) it is respectfully submitted that the construction must be rejected as inadmissible.

2.5. *Distinguishing amendments and commitments*

The Merger Regulation explicitly deals with commitments given in order to obtain a clearance. However, the concentration must be notified so early[56] that frequently the undertakings concerned cannot provide all the necessary information before the deadline, either because it was not accessible at that time or because the operation undergoes some amendments after notification. This was acknowledged by the legislators when preparing the Merger Regulation, so that the phase one deadline only starts running when the Commission has received complete information.[57]

Technically speaking, an amendment may be defined as an agreement between the undertakings concerned to change the concentration plan as such, whereas a commitment is a promise from the undertakings to the Commission which constitutes an addition to the concentration plan. An amendment essentially constitutes a renotification and it follows that only insignificant amendments may be made during phase two (otherwise the undertakings concerned essentially have to go through a renotification).

At first glance this distinction may appear subtle or even artificial. Nevertheless, it carries with it some significant differences:

First, the Commission may (and often must) count the phase one deadline from (the day following the day) when the amendment was

56. Notification must take place "not more than one week after [the first of] the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest." Cf. Art. 4(1).

57. See Art. 10(1) of the Merger Regulation and Art. 4(3) of Commission Regulation (EC) No. 3384/94 of 21 Dec. 1994 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings.

notified, thereby providing more time to carry out the necessary evaluation thereof.

Second, an amendment is part of the concentration plan. If the undertakings concerned do not duly observe the concentration plan, but instead carry out an operation without the amendment, the Commission may find that the actual operation differs from the one cleared to such degree that the actual operation amounts to an unnotified concentration.[58] In such case the Commission may impose fines for failure to notify[59] and the validity of any transaction carried out as part of an un-notified concentration is dependent upon a subsequent clearance.[60]

Third, since the amendment is treated, essentially, like a renotification, the (rather limited) phase one safeguards apply. This means that the Commission must transmit the amended concentration plan to the competent authorities of the Member States.[61] Also, as noted above,[62] within three weeks from the receipt of notification, a Member State may ask the Commission to refer the concentration to its national competition authorities. This precludes a Commission clearance until the three weeks have elapsed. It is arguable that this provision equally applies to amendments, so that the Commission cannot issue a clearance within three weeks following the Commission's transmission of the undertakings concerned's amended concentration plan to the competent authorities of the Member States.

Fourth, it might be that in the case of breaches of commitments and amendments there is a difference as to who is to bear the burden of

58. See also 2.3 *supra*.

59. Art. 14(1).

60. The views expressed here, to a certain degree find parallels in the views expressed by Drauz, op. cit. *supra* note 9 at p. 116. See also A.G. Lenz in his Opinion of 12 Sept. 1995 in Case C-480/93, *Zunis Holding* v. *Commission*, [1996] ECR I-1, at para 14. The case was an appeal from the CFI; see in this respect Case T-83/92, *Zunis Holding* v. *Commission*, [1993] ECR II-1169, paras. 28 and 33. It is, however, noteworthy that once a deal has been implemented, it is often very difficult to unscramble, cf. Sir Leon Brittan, *European Competition Policy – Keeping the Playing-Field Level* (Brassey's and CEPS, 1992), at p. 109.

61. Art. 19(1). See also Arts. 19(2) and 18(4).

62. Note 20, referring to Art. 9(2) of the Regulation.

proof. Thus, one may argue that it is for the undertakings concerned to prove that they have duly fulfilled a commitment given to the Commission whereas it is for the Commission to prove that the undertakings concerned have not duly observed the (amended) concentration plan.

Finally, not all commitments can be changed to amendments. This is particularly the case where the commitment is made by a third party, for instance where two air carriers join forces and the public authorities (not the air carriers) give commitments regarding structural barriers in the affected markets.[63]

One may argue that if phase one commitments are not lawful, then replacing the present use of such commitments with amendments amounts to circumvention. This argument is wrong however. If an amendment is treated along the lines set out here, there is no real difference between renotifications and amendments. Hence there is no doubt that the Commission has the power to accept amendments (and renotifications), and neither the legal safeguards nor the Commission's power to enforce the amendments present problems.

The question is what value this technique has to the Commission? It is fairly clear that phase one clearances issued on the basis of commitments until now cannot be construed as clearances based on amendments: While Member States (and third parties) have been notified of the commitment the Commission has not started the phase one deadline anew, and the clearance has been issued before the three weeks period, provided in Article 9(2), has expired. The technique may, however, prove timesaving. Above it is argued that the present merger control scheme provides the necessary flexibility to issue phase two clearances based on commitments within a short period. Nevertheless, the Commission does not exploit this flexibility and it is not likely to do so either. At least in the more straightforward cases, the amendment technique may prove an efficient and speedy way of obtaining almost the same benefits as provided by phase one commitments without compromising the legal safeguards or the enforcement possibilities.

63. See e.g. *Air France/Sabena*, *British Airways/TAT* and *Swissair/Sabena*, *supra* note 7.

3. Conclusion

The above analysis leads to the conclusion that the Commission may not clear a concentration on the basis of commitments given in phase one. The arguments that the Commission possesses such power either by interpreting Article 8(2)(2) by analogy or by invoking the proportionality principle are rebutted.[64] In contrast the argument that such phase one commitments may significantly prejudice the legal safeguards built into the Regulation is found to be very convincing. As concerns the Commission's possibility of enforcing first phase commitments, it necessarily follows from general administrative law principles that if the Commission does possess the power to accept phase one commitments, it must also be able to revoke a decision where the accepted commitments have not been duly observed.[65] The more formal justification for such revocation may be found either in an interpretation by analogy or simply in the implied powers doctrine. Only because it is found that the Commission does not possess the power to accept phase one commitments in the first place, is it concluded that the Commission cannot enforce those phase one commitments which it has accepted, irrespective of the fact that it lacks the power to do so. The possibility of enforcing phase one commitments through a contract construction based on Article 181 is also dismissed.

Two possible ways out of the maze are identified. Either the Commission may exploit more fully the flexibility built into the merger control scheme by issuing second phase clearances, based on commitments, much faster than is done at present, or it might use a construction based on amendments instead of commitments.

64. In addition to the legal arguments in favour of first phase commitments, a justification based more on psychology seems to have been important in the Commission's decision to accept phase one commitments, cf. Overbury, op. cit. *supra* note 30 at 576 and the same author op. cit. *supra* note 9 at p. 115.

65. Public authorities may rely on implied conditions in their decisions; in this case the condition that the commitment is observed.